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Nintendo of America, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

EPIC GAMES, INC.,

PLAINTIFF and
COUNTER-
DEFENDANT,

V.

APPLE, INC.,

DEFENDANT and
COUNTER-
CLAIMANT.

Case No. 4:20-CV-05640-YGR

NON-PARTY NINTENDO OF AMERICA
INC.'S NOTICE OF MOTION AND MOTION
FOR LEAVE TO SEEK
RECONSIDERATION REGARDING
SEALING PORTIONS OF THE KREINER
DEPOSITION

NOTICE OF MOTION AND MOTION

TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Non-Party Nintendo of America Inc. (“NOA”) moves this Court pursuant to Local Civil Rule 7-9 for leave to seek reconsideration regarding the Court’s May 7, 2021 Trial Order No. 2 (Dkt. 609) declining to seal certain portions of the deposition transcript of Joe Kreiner (“Kreiner Deposition”). NOA’s request is based on this notice and motion, the accompanying memorandum of points and authorities, and the supporting Declaration of Steven Singer.

NOA respectfully requests that the Court allow NOA to seek reconsideration of the Court’s decision not to seal Kreiner Deposition 82:14-83:3 and 83:12-16 or, in the alternative, seal Kreiner Deposition 82:14-83:3 and 83:12-16.

DATED: May 10, 2021

s/David Chiappetta

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MEMORANDUM OF POINTS AND AUTHORITIES

NOA requests leave to seek reconsideration of the Court’s ruling (Dkt. 609 at 6-7) denying Apple’s motion (Dkt. 505) to seal portions of the Kreiner Deposition. NOA’s motion focuses on two narrow excerpts of the Kreiner Deposition found at 82:14-83:3 and 83:12-16. NOA brings this motion pursuant to Civil Local Rule 7-9. The motion is accompanied by the Declaration of Steven Singer in Support of Non-Party Nintendo of America Inc.’s Motion for Leave to Seek Reconsideration Regarding Sealing Portions of the Kreiner Declaration (“Singer Decl.”).

A party seeking reconsideration must show (i) reasonable diligence in bringing the motion and (ii) that at least one of three enumerated conditions applies. Civ. L.R. 7-9(b). One condition that supports a motion for leave to seek reconsideration is when a court failed “to consider material facts . . . which were presented to [it].” Civ. L.R. 7-9(b)(3).

NOA’s request for leave to seek reconsideration as to Kreiner Deposition 82:14-83:3 and 83:12-16 meets both requirements. First, NOA acted quickly and diligently to file its motion for leave to seek reconsideration. The Court’s order denying sealing issued just a few days ago on May 7, 2021. (Dkt. 609.)

Second, NOA previously submitted a declaration (Dkt. 568) to support Apple’s motion to seal that included Kreiner Deposition 82:14-83:3 and 83:12-16. (Dkt. 505-1 at 4.) The declaration explained that portions of the Kreiner Deposition (including 82:14-83:3 and 83:12-16) reflected terms of the relationship between Nintendo¹ and Epic that are not public and were negotiated privately between Nintendo and Epic. (Dkt. 568 ¶¶ 4, 6, 8.) The declaration also explained that the negotiated terms are competitively sensitive, and that public disclosure would cause harm to Nintendo. (*Id.*) The Court determined, however, that the terms of agreement discussed in Kreiner Deposition 82:14-83:3 and 83:12-16, as well as other portions of the transcript, were “already disclosed elsewhere, including in the generic agreement for which

¹ NOA is a subsidiary of Nintendo Co., Ltd. (“NCL”), a Japanese corporation. (Singer Decl. ¶ 1.) NCL has many other subsidiaries. (*Id.*) For purposes of this motion only, “Nintendo” refers to NCL and its subsidiaries, including NOA, even though NCL and its subsidiaries are separate and distinct entities.

1 sealing was denied.” (Dkt. 609 at 6-7.) NOA respectfully submits that, while the Court’s
2 statement may have been correct with respect to other portions of the transcript, it does not apply
3 to Kreiner Deposition 82:14-83:3 and 83:12-16. Nintendo’s generic Content License and
4 Distribution Agreement, which the Court declined to seal, does not describe the terms of
5 agreement reflected in Kreiner Deposition 82:14-83:3 and 83:12-16. (Singer Decl. ¶¶ 3, 6.)
6 Indeed, the testimony itself describes those terms as departures from Nintendo’s ordinary
7 practice. As NOA’s declarant previously explained (Dkt. 568 ¶¶ 4, 6, 8), the terms of agreement
8 reflected in Kreiner Deposition 82:14-83:3 and 83:12-16 were the result of negotiations between
9 Nintendo and Epic, are specific to the relationship between Nintendo and Epic, and have not been
10 disclosed to the public. (*Id.* ¶¶ 3-5.) These facts, which were previously presented to the Court,
11 support sealing for Kreiner Deposition 82:14-83:3 and 83:12-16.

12 Because the terms of agreement described in Kreiner Deposition 82:14-83:3 and 83:12-16
13 resulted from sensitive negotiations and would cause competitive harm to Nintendo if disclosed
14 publicly, NOA respectfully requests that the Court grant its motion for leave to seek
15 reconsideration of the sealing of two narrow passages of deposition testimony, or in the
16 alternative, seal Kreiner Deposition 82:14-83:3 and 83:12-16.

17
18 DATED: May 10, 2021

s/David Chiappetta
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Nintendo of America Inc.

CERTIFICATE OF SERVICE

☒ I hereby certify that on May 10, 2021, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants in this case.

s/ David Chiappetta
Attorney